No. 15704

IN THE

# United States Court of Appeals

## for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

**APPELLANT'S REPLY BRIEF**

Appeals from the United States District Court for the District of Montana, Great Falls Division

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ORIN R. CURE
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### FINAL CONCLUSION

Appellee's counsel do not even attempt to assail the fundamental principle of insurance law upon which this appeal is bottomed, stated by the supreme court of Pennsylvania in Barry et us vs. Aetna Ins. Co., 81 At1. 2d 551 as follows:

> "When a loss, occurring before the risk attaches, is known only to the applicant and he obtains a policy without disclosing the fact of the loss, the policy is void even though the contract be given a date prior to the loss."

Our case is not taken out of that law.

Appellee's counsel argue, in the teeth of this principle:

> "There is nothing illegal or wrong in entering into an insurance contract for protection against a loss which may already have occurred, nor is there anything illegal or wrong in issuing a policy and predating said policy." (Appelle's Brief, Page 20)

Section 13-405 of the 1947 Revised Codes of Montana codifies the law, which the adjuster Hirst seems to have had in mind when he issued the notice October 27, 1952 to appellee (Def. Ex. 18 R. 212) that he "did not have any insurance in effect at the time this loss occurred." The writer does not see, under the authorities we have cited, why this policy could not be valid as to losses occurring after the application for the policy was accepted, 9:30 A.M. September 20, 1952, until the policy was cancelled. Section 13-405 of the Montana Codes is identical with Section 1599 of the California Civil Code, under which the California courts go a long way in separating the legal and illegal parts of the contract and give effect to the legal portions (See Kerr's Annotations).

Section 13-405, R. C. provides:

> **"When contract partially void.** Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

Appellee's counsel attempt to circumvent the principle of law upon which we stand by claiming estoppel; that we cannot invoke the law we rely upon be-

cause appellee had a contract to insure prior to September 20th, 1952; and that the matter involved in this appeal is determined against appellant in a "Judgment", given by Judge Speer, and sanctioned by Judge Pray in his opinion (R. 32).

Appellee has not shown estoppel or waiver nor are either available to appellee because against public policy and illegality of appellee's obtaining the policy by concealment of the loss when policy issued.

In the second place, appellee failed to prove a binding contract to insure prior to September 20th, 1952, nor to show estoppel against a claim of insurance prior to September 20th.

Lastly, neither Judge Speer's "Order" (R. 24) nor Judge Pray's "Opinion" or decision (R. 32) adjudicate any issue relevant in this case, nor, are they competent as evidence to any relevant fact.

## ESTOPPEL OR WAIVER

It stands admitted, a) that after the accident September 20th, 1952, appellee's wife tried to get a policy dated September 19th, 1952 and tried to get Kelly's office to date the policy September 19th (R. 167, 168). When asked if she had an accident, she said "No." (R. 168); b) appellee appeared in Kelly's office before noon of September 20th and reported that the accident happened at 9:30 (R. 169); c) appellee stated in his Report of Automobile Accident, (Ex. 12, R. 202):

> "Date of accident: September, 20, 1952. Hour 9:30 o'clock A.M."

This written statement was given to Hirst's secretary, put into the "Report" then read over by appellee before he signed it. None of this evidence is questioned in the Record. We argued it in our Brief (p. 8) and appelle's counsel no where has taken issue as to the facts. We, therefore, assume the evidence is not only true but accepted as true by appellee.

No case holds that an insured ever had, or can have, coverage of such a risk as herein involved. It follows that appellee never did have a "right," in the premises. To have a waiver there must be a relinquishment of a known "right" and it implies knowledge of the existence of facts and an intention to forego a "right" which might have been asserted (Griffith vs. Mont. Wheat Growers Ass'n. Mont., 244 Pac. 277). Beginning with Hirst's denial of coverage October 22nd, 1952, and ever since, appellee's claim to coverage for this accident has been denied by appellant. It is inconceivable how appellee has, or could, forego any "right" by the mere fact of delay in either serving notice of cancellation of the policy or return of the entire premium, except possibly appellee's right to have earlier demanded a return of his premium. Appellee shows no adjudicated case where any insured has finally done so.

45 C.J.S. p. 715 states a principle applicable, even where there is no fraud or concealment:

> "Where knowledge of facts authorizing a forfeiture is first acquired by insurer after loss, it may remain silent and passive without losing its right to assert its defense."

This principle is adhered to in Goorberg vs. Western Assurance Co. (Col.) 89 Pac. 130, which, in turn is followed and quoted in Peterson vs. Universal Auto. Ins. Co. (Ida.) 20 Pac. 2d 1016 at p. 1021, as follows:

> " 'The defendant is not in this action seeking to rescind the contract sued upon. It is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or non-action of the insurer after the loss, it is essential "that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action.'
>
> "In the instant case, as in the case just quoted from, nothing was done by respondent which could have led the appellant to believe that it would not take advantage of the breach of warranty; respondent steadfastly refused to assume responsibility."

In 17 C.J.S. p. 677, we read:

> "Illegality of part of a single consideration or of several considerations for a single promise is fatal."

And on page 679, the author continues:

> "A contract lawful on its face or capable of lawful execution may be enforced by the innocent party despite the unlawful purpose of the other party."

Much could be said in support of Hirst's position, apparently taken under Sec. 13-405 of the Montana Codes in that he did not notice cancellation of the policy in its entirety, merely gave notice of denial

of coverage as to the illegal part. There is nowhere involved loss occurring after acceptance of the application.

At any rate, the cases seem to support the rule stated at 45 C.J.S. pp. 714-5:

> "Where knowledge of facts authorizing a forfeiture is first acquired by insurer after loss, it may remain silent or passive without losing its right to assert its defense although it has been held that it is the duty of the company to manifest its intention promptly to avoid the policy."

The author cites German Fire Ins. Co. vs. Gibbs (Tex.) 92 S.W. 1068 for the latter part of the rule on duty to manifest intention which Hirst very promptly did (Oct. 27, 1952). As we have shown, (opening Br. 17) the Texas courts adhere to the rule that an insurance agent is powerless to issue a policy covering a known loss before the contract of insurance is made and such a policy is invalid, incapable of ratification in Texas (Br. 18). When we later (June 11, 1954) tendered appellee the remainder of the whole premium, we merely washed our hands of Leo Tacke, after appellant had, in the writer's opinion, afforded him full coverage from October 20th, 1952, at 9:30 A.M. until the policy was cancelled. Kelly, even if he intended, could not have covered a loss of over $5,000.00 having theretofore occurred for a paltry premium of $39.00. No State Commissioner of Insurance in the United States would stand for that.

We shall sum the matter up with Northwest Amusement Co. vs. Aetna Cas. & S. Co., 107 Pac. 2d 110

where the supreme court of Oregon states the rule against giving validity to illegal provisions in an insurance policy:

> "The rule of public policy, which prevents a recovery in court upon such an agreement, is not based upon the impropriety of compelling the defendant to comply with his contract. That in itself would generally be a desirable thing. Relief is denied, because plaintiff is a wrongdoer.
>
> "Courts do not wish to aid a man who found his cause of action upon his own immoral or illegal act. *** The court's refusal is not for the sake of the defendant, but because it will not aid such a plaintiff." Id., § 598, p. 1110. *****
>
> "Among others, the following four tests have been applied by the courts in determining whether or not recovery should be permitted upon contracts challenged as illegal. (B.U.L.R. 962, 966.)
>
> (1) Did they aid or tend to aid a result possible of attainment only by an unlawful act, or one contrary to public policy? Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S. W. 178, 9 L.R.A., N.S., 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829. (2) Could the plaintiff establish his case without referenye to or reliance upon an illegal act or transaction? McMullen v. Hollman 174 U.S. 639, 19 S. Ct. 839, 43 L.Ed. 1117. (3) Is the contract based upon separate legal consideration? Armstrong v. Toler supra; Holt v. O'Brien, 15 Gray, Mass., 311. (4) What is the evil apprerended if the contract be enforced? Sage v. Hampe, 235 U.S. 99, 35 S.Ct. 94, 59 L.Ed. 147."

Insurance law is a specialty but the Oregon court applied the general law of contracts stated by Justice Holmes in Sage vs. Hampe 235 U.S. 99, 35 S.Ct. 94. 59 L.Ed. 147, as follows:

"A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for nonperformance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Kalem Co. v. Harper Bros. 222 U. S. 55, 63, 56 L. ed. 92, 96, 32 Sup. Ct. Rep. 20; Ann. Cas. 1913A, 1285. And more broadly, it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit."

Our case transcends mere fraud. Appellee is enmeshed in illegality, and as stated in 17 C.J.S. "Contracts" Sec. 272:

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. . . . The law, in short will not aid either party to an illegal agreement; it leaves the parties where it finds them. The general rule is the same both at law and in equity. Likewise, the general rule is the same whether the contract is executory or executed.

. . . . In such case the defense of illegality prevails, not as a protection to defendant, but as a distability in plaintiff."

The law of waiver or estoppel has no application, there is neither waiver or estoppel to the defense of illegality (17 C.J.S. Contracts, § 279).

Our position is that due notice of disclaimer of liability was given, as was due notice of cancellation of the policy; that the loss having occurred before

appellant knew of the grounds for forfeiture, retention of the premium, or a part of it, does not prevent the defense of forfeiture in appellee of any rights as to such loss. Finally, allowance of appellee's claim in this case is against public policy; that the claim is illegal and that waiver and estoppel has no application.

## APPELLANT HAD NOT ENTERED INTO A CONTRACT OF INSURANCE PRIOR TO SEPTEMBER 20, 1952

As we understand appellee's position, it is that nothing more happened September 20, 1952, as to issuance of policy or coverage than Mrs. Tacke's telephone call to Kelly's office "to determine why the insurance policy had not been received," (Br. p. 2) with the inference that Kelly had promised, but neglected to issue the policy prior to September 20th. He leans heavily on Judge Pray's "opinion" (Br. pp. 2, 3) and Judge Speer's order reversing Supervisor Schultz's Order of Suspension of Appellee's license to drive a car. Of Judge Speer's Order, Appellee's counsel says (Br. 7):

> "The determination was that there was insurance in effect at the time of the accident (R. 24). The Order of Judge Speer dated the 30th day of July, 1953 (R. 24) is clear on this point."

As we shall show in the succeeding section of this brief, appellee's counsel is quite in error as to Judge Speer's "determination" of this fact. Frankly, we do not yet know the office or function of Judge Pray's "Opinion" (R. 32) hardly a part of the Record, though incorporated therein (Bowles vs. Dodge, 141

Fed. 2d 969). It cannot be accepted as evidence of its recitals any more than Judge Speer's recitals in this Order. Certainly neither binds anyone nor does either adjudicate anything. Take them out as evidence, appellee stands on his bald statement that Mrs. Tacke phoned to Kelly September 20th "to determine why the insurance policy had not been received." We do not want to be facetious at this point, so have decided to assume appellee's burden of assembling the evidence, none of which appellee's counsel dared to do.

Mr. Tacke related that two or three weeks before the accident (R. 73) at 20th Street and Sixth Avenue South, he was putting in a lawn, where Kelly called and he, Tacke, "advised Mr. Kelly that we would insure the '48 Chevrolet which we were repairing with him" (R. 73). When requested by the Court to state the conversation, Tacke testified (R. 74):

"THE COURT: Yes, state the conversation.

"Q. And what other conversation was there?

"A. I don't understand.

"Q. Was there any other conversation at that time with Mr. Kelly?

"A. About insurance?

"Q. Yes.

"A. Yes, Mr. Kelly had agreed to pay me a commission on any mostly real estate that I listed, especially listings that I brought to his office. We expressed in this conversation that I appreciate this offer as a result of appreciation the policy on this car would be written with him.

"Q. And was there any other conversation then concerning the insurance at that time ?

"A. At present I don't recall it."

A week later, Tacke talked with Kelly on Kelly's front lawn. Tacke had put a lawn on this property and stopped there and Kelly paid him (R. 75, 6). The following is Tacke's testimony of the conversation he had with Kelly, (R. 75):

"Q. And what was the conversation at that time concerning the insurance in question?

"A. That the '48 Chevrolet which we were rebuilding from a wreck I had bought it as a salvage wreck, would be in running, in driving shape very shortly, within a matter of a few days and we were interested to know that he was covering it, and further we made further arrangements on how the policy would be paid.

"MR. HOFFMAN: Just a minute, please. We ask that the conversation be given and not his conclusions as to what was done.

"THE COURT: Yes.

"Q. You stated that you wished a policy of insurance to be issued to be made available, is that what you said?

"A. Correct.

"Q. And what other conversation was there?

"A. I had given Mr. Kelly a party that was interested in buying a lot and they had expressed to me appreciation for service I had rendered them and in return they said—

"MR. HOFFMAN: Just a minute, please. He is go-into a lot of hearsay; the conversation between Mr. Kelly and this witness.

"THE COURT: Yes.

"A. That he would be paid out of the commission on a lot that I was delivering to him for sale.

"Q. And was there any other conversation as such concerning the policy at that time?

"A. I don't recall it."

There is no evidence that Kelly ever sold this lot or than a commission on a sale of it was ever earned or paid.

Mrs. Tacke testified that about September 7, 1952 (R. 110) she had a conversation with Kelly. The record is (R. 111):

"Q. And what was the conversation at that time relative to the insurance contract?

"A. Well, Mr. Kelly called and wanted Leo to go up and give him an estimate on that small lawn he wanted to put in in the back of his rental property and I told Mr. Kelly at that time that Leo would go up and give him an estimate, and I said in appreciation, Mr. Kelly, for your giving us this lawn work we will take out insurance on the 1948 Chevrolet with you.

She also testified about a second conversation, as follows (R. 111).

"Q. Was there any other conversation at that time concerning the insurance?

"A. Well I called the number to the office and one of the salesmen answered.

"Q. At that time or that same day?

"A. No, that same day.

"Q. I already asked as to the first conversation.

"A. And he says, when you are ready that will be fine, is what he told me."

A week later she called Kelly's office on the phone. Concerning this call she testified (R. 111):

"A. It was oh just a few days, possibly a week later I called in to the office in the afternoon when the baby and little boy was both asleep, while it was quiet, to see if I could get hold of Mr. Kelly and one of his salesmen answered the telephone and said he was real busy and I asked him I said I want to find out about some insurance; he said, we are real busy, you will have to talk to Bill about that and hung up, and so I left word for him to call us, at the office to be called; well, I never got the call, It was neevr called back."

Her testimony about a "third" conversation (R. 112) is as follows:

"Q. And you testified there was a third conversation and with whom did you have that conversation?

"A. Well Mr. Kelly called between twelve and one, on a Wednesday, about the 17th.

"Q. 17th of what?

"A. September.

"Q. What year?

"A. 1952. He called because he wanted my dad. My dad had equipment, a little tractor and with this equipment they can clear weeds and do lawn work, and he wanted my dad to go up and clear the weeds and lawns and clear the rubbish off a piece of property he had for sale at about 37th some place and he said, if I can get the weeds cleared off this afternoon, I think I have a sale for it this afternoon before five o'clock. If he could get the weeds and rubbish cleared away from that property. So I assured him I would get hold of my dad

and get him up there. He said, I am awfully busy and the office is full of people, and I said to him, Bill, be sure Leo is covered by insurance, and he says, thank you, goodby, and that was the conversation."

On cross-examination, Mrs. Tacke testified (R. 120):

"Q. Now in all of these conversations to which you have testified did you ever mention to Mr. Kelly in any of these conversations what kind of insurance you wanted on this car ?

"A. I said on the insurance on the '48 Chevrolet liability.

"Q. Did you tell him that you wanted liability insurance ?

"A. That I can't remember.

"Q. Did you tell him how much liability insurance or any kind of insurance you wanted ?

"A. That I don't remember whether I did or not.

"Q. Did you tell him about how much property insurance you wanted at any time; I am talking now about the three conversations which you say you had before September 20th ?

"MR. ANGLAND: To which we object, there isn't anything in the policy to show there is any property insurance in the policy, your honor. We object to the question as not tending to prove or disprove any issue in the case; it is incompetent, irrelevant and immaterial."

Mr. Angland succeeded in blocking any answer to the last question (R. 120).

The "salesman" she referred to and with whom her "second" conversation with Kelly's office was had was Tom Sterling (R. 121), Kelly's real estate

salesman (R. 182), who did not write insurance. (R. 182).

Mr. Kelly testified, as to Tacke's conversation with him two or three weeks before the accident, at 28th Street and Sixth Avenue South, that it was "generally and completely about landscaping; in the conversation I have no recollection about ordering any insurance as Mr. Tacke has testified" (R. 179). He had no recollection of Mr. Tacke saying that when he was ready to insure he would insure the Chevrolet with Kelly (R. 180). Mr. Kelly further testified (R. 179, 180):

"Q. Now in reference to the question Mr. Tacke has testified that it was then and there agreed between you and him that the premium on the insurance policy would be paid out of the commission on a real estate deal involving real estate that was referred to your office through Mr. Tacke's activities as he testified, was there anything said between you and Mr. Tacke at that time about paying for any premium of insurance in that way?

"A. Nothing.

"Q. He also testified that when he told you he was going to take the insurance on the Chevy that you expressed an appreciation of knowing so, did you do any such thing ?

"A. No, I didn't. I had no knowledge of any insurance until the day of the accident.

"O. Now he spoke about a second conversation with you about this insurance and again after this which I take it on this testimony would be one or two weeks before the accident he said he had a converation with you on your

own home lawn, do you remember a conversation about that time ?

"A. Yes, I do.

"Q. And you may state to the court whether or not at that time he made any statement in substance and effect that his Chevy would be in driving shape in a few days and that he wished a policy of insurance to eventually issue on this out of your office ?

"A. I have no knowledge of the '48 Chevy ever being mentioned; that night when he stopped I was mowing the lawn and he did express to me he had been writing insurance with Yeoman especially hail insurance and that he would certainly like when the hail season came up to swing the business over to our office if we would help him with his landscaping, that I naturally being in business encouraged but we did not ever receive any business from Mr. Tacke, nor did we ever license him, and that is the only conversation about insurance I can remember prior to the accident and that had relationship only to hail insurance.

"Q. Did you ever at any time have a request for insurance on this Chevy from Mr. Tacke, you personally ?

"A. I personally never have, no."

Concerning Mrs. Tacke's testimony, as to her conversation with Kelly, he testified (R 182):

"Q. Now there was some testimony by Mrs. Tacke that about September 17th you wanted her father to clean up a property for sale and in connection with that business did she or did did she not say to you, Bill, be sure that we are insured ?

"A. Never."

Mrs. Halverson testified that Mrs. Tacke did not

ask her, September 20th, why Mr. Tack's policy had not come through (R. 167); she wanted Mrs. Halverson to date the policy ~~September~~ yesterday" and then Mrs. Halverson asked her if she had an accident; Mrs. Tacke replied "No." (R. 163).

Concerning Exhibit 13, the application for the policy, Mrs. Halverson testified (R. 166):

"A. We bind coverage by those applications. Sometimes the policy is not written for a day or so even and we don't have time to do everything as it comes in so when the information is put on that form they are covered right at the time."

When Mr. Kelly showed up, Mrs. Halverson was suspicious and testified as to her disposition of the application as follows: (R. 168, 9)

"A. Well when, after he came to work which was, must have been close to ten I laid the application on his desk and told him of the details that the woman was a little fluttered, that she wanted to date the policy the day before and I said, well, what do you think about it, do you think I should write it ? And he said, well, all right. And I said, do you think they had an accident ? He said, of course, not, they wouldn't do a thing like that. So I wrote the policy.

"Q. So you proceeded to write the policy under those conditions to Mr. Kelly directions ?

"A. Yes, sir.

"Q. Did Mr. Tacke call in that forenoon and report this accident ?

"A. No. I believe Mr. Tacke came into the office just before noon sometime.

"Q. Just before noon ?

"A. Yes, and he reported the accident that it happened about 9:30.

"Q. And did you have the policy issued at that time ?

"A. Yes, the policy had been written.

"Q. Issued and signed ?

"A. Yes."

No policy issued until September 20th. The only evidence of an agreement by Kelly to insure is Mrs. Tacke's testimony that Wednesday, September 17th Kelly phoned to her that he wanted her father to clear a lot for sale. In that conversation, she says that she said to him: "Be sure Leo is covered by insurance" and he says, "thank you, goodby." The premium, when and if Kelly insured, was to be paid out of the commission on a lot that appellee had delivered to Kelly for sale (R. 76). No evidence appears whether this lot was even sold, or whether appellee had received his share of the commission for getting the business. There is wholly lacking any evidence of an "application" for this policy or a "promise to insure" before September 20th. We concede that the name of the insurance company possibly need not be agreed upon, but a particular description of the car, kinds and amounts of insurance, and the day the insurance must begin are essential parts of a contract to insure that were never agreed upon or mentioned until the admitted application, September 20th. No insurance by estoppel is shown or alleged. No

policy was written or ordered out until September 20th.

## JUDGE SPEER'S "ORDER" and JUDGE PRAY'S "OPINION" ADJUDICATE NO ISSUE HEREIN

It is obvious, it seems that if Judge Speer determined that the policy of insurance was in effect at the time of the accident, as appellee's counsel asserts (Br. 7), the matter pending in the instant case is res adjudicata. This was urged by appellee's counsel before the trial court with the surprising effect that in his Opinion filed May 26, 1956, the trial court actually did say of Judge Speer's order:

> "Honorable James W. Speer, Judge of said court . . . held that the plaintiff, Leo Tacke, was insured at the time of the accident." (R. 33).

The trial judge seemed of the opinion that appellant "was duly notified to appear before Judge Speer" but did not appear. (R. 33.)

We have no evidence, nor is there any, to sustain such position. The Canadian Indemnity Company was never summoned nor subpoenaed to attend the hearing before Judge Speer; nor was it, or could it be, a "party" thereto. That hearing is bottomed upon Section 53-419 of the Montana Codes, which vests the automobile owner aggrieved by an adverse order of the highway supervisor with the right to appeal to the district court within sixty days after the order. This statute provides:

> "Said appeal may be for the purpose of having the lawfulness of any order, decision, or act of the said supervisor inquired into and determined."

Upon certification of the matter to the district court, the court:

> "Shall fix a day for the hearing of said appeal, and shall cause notice to be served upon the supervisor and upon the appellant, and also upon any other parties in interest upon whom service was required under the provisions of this section."

Service under the act was required to be made as follows:

a) "By serving a written notice of said appeal upon the supervisor.

b) A copy of such notice must also be served upon all other parties in interest, if there be any, by mailing the same to said parties in interest to such addressses of such parties as such parties shall have left with the supervisor. If such parties shall have left no address with the supervisor, then no service on such parties shall be required."

So far as the record shows, and as far as the writer knows, appellant never did leave its address with the supervisor. It was, and is, our opinion that whether the policy covered the accident involved was a justiciable issue that could not be determined in any such procedure before Judge Speer, and therefore, the procedure before Judge Speer was of no interest to appellant. The statute prescribes the jurisdiction of Judge Speer as follows:

> "Upon such trial the court shall determine whether or not the supervisor regularly pursued his authority, and, whether or not such findings are reasonable, under all circumstances of the case . . . If the court shall find from all such trial, as aforesaid, that the findings and conclusions of the supervisor are not in accordance with either the facts or the law, or that they ought to be other or

different than those made by the supervisor, or that any finding and conclusion, or any decision, order, act, rule, or requirement of the supervisor is unreasonable, the court shall set aside such finding, conclusion, decision, order, act, rule or requirement of said supervisor, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises."

Section 53-419 of Montana Codes provides:

"Supervisor to administer act—appeal to court. (a) The supervisor shall administer and enforce the provisions of this act and may make rules and regulations necessary for its administration and may provide for hearings upon request of persons aggrieved by orders or acts of the supervisor under the provisions of this act.

(b) An executive assistant to the supervisor shall be appointed by the "Montana highway patrol board," subject to and in accordance with sections 31-105 and 31-106, who shall be vested with full power and authority to act for and on behalf of the supervisor in the administration of this act; and who shall perform such other and further duties as shall be prescribed by the Montana highway patrol board. The salary of the executive assistant shall be four thousand two hundred dollars ($4,200.00) per year.

(c) At any time within sixty (60) days after the rendition of any decision or order by the supervisor under the provisions of this act, any party in interest may appeal to the district court of the judicial district of the state of Montana, in and for any county wherein any party in interest may reside, or in which any party in interest which is a corporation may have its principal office, or place of business, and said appeal may be for the purpose

of having the lawfulness of any order, decision, or act of the said supervisor inquired into and determined. The court shall determine whether the filing of an appeal shall operate as a stay of any order or decision of the supervisor. Said appeal shall be taken by serving a written notice of said appeal upon the supervisor, which said service shall be made by delivering a copy of such notice to the supervisor and filing the original thereof with the clerk of the court to which said appeal is taken. A copy of such notice must also be served upon all other parties in interest to such addresses of such parties as such parties shall have left with the supervisor. If such parties shall have left no address with the supervisor, then no service on such parties shall be required. The order of filing and service of said notice is immaterial. Immediately upon service upon said supervisor of said notice, the supervisor shall certify to said district court a complete record of all proceedings had by him with reference to the decision, order or act appealed from, together with all official forms or documents in the possession of said supervisor pertaining to said decision, order or act, and all correspondence and other written matter in the possession of said supervisor pertaining to said decision, order or act, with the clerk of the said district court. Immediately upon the return of such certified matter, the district court shall fix a day for the hearing of said appeal, and shall cause notice to be served upon the supervisor and upon the appellant, and also upon any other parties in interest upon whom service was required under the provisions of this section. The court may, upon the hearing, for a good cause shown, permit evidence in addition to the matter certified by the supervisor to the court, but, in the absence of such permission from the court, the cause shall be heard on the matter certified to the court by the super-

visor. The trial of the matter shall be de novo, without a jury, and upon such trial the court shall determine whether or not the supervisor regularly pursued his authority, and whether or not the findings of the supervisor ought to be sustained and whether or not such findings are reasonable, under all circumstances of the case. The supervisor, and each party in interest, shall have the right to appear in the proceeding. If the court shall find from such trial, as aforesaid, that the findings and conclusions of the supervisor are not in accordance with either the facts or the law, or that they ought to be other or different than those made by the supervisor, or that any finding and conclusion, or any decision, order, act, rule, or requirement of the supervisor is unreasonable, the court shall set aside such finding, conclusion, decision, order, act, rule or requirement of said supervisor, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises. Either the supervisor, or the appellant, or any other party in interest, if there me any, may appeal to the supreme court of the state of Montana, from any final order, judgment, or decree of said district court, which said appeal shall be taken in like manner as appeals are now taken in other civil actions to the said supreme court, and upon such appeal, the said supreme court shall make such order in reference to a stay of proceedings as it finds to be just in the premises, and may stay the operation of any order, judgment, or decree of said district court, without requiring any bond or undertaking from the applicant for such stay. When any such cause is so appealed, it shall have precedence upon the calendar of said supreme court upon the record made in said district court, and

judgment and decree shall be entered therein as expeditiously as possible."

This is a serious matter, judgments against persons not made "parties" to the action or proceeding, nor summoned or even subpoenaed to answer as to their rights—deprivation of the opportunity or right to trial by jury.

Art. III Sec. 23 of the Montana constitution provides:

> "The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default or apperance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice's court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six person. In all civil actions and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein."

Under Sec. 93-2301 of the Montana Codes, there is in Montana but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs and under section 93-2302 of our codes, the party complaing is known as plaintiff and the adverse party as the defendant. Under section 93-4905, issues of fact must be tried by a jury, unless a jury trial is waived and under the decisions of the Montana Supreme Court, a party cannot waive his right to a trial by jury ex-

cept by the modes prescribed by statute (Moore vs. Capital Gas Corporation 117 Mont. 148, 158 Pac. 2d 302. Chesman vs. Hale, 31 Mont. 577, 79 Pac. 254). These modes are prescribed in Section 93-5301 of our codes which provides:

> "When and how trial by jury may be waived. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:
>
> 1. By failing to appear at the trial;
> 2. By written consent, in person or by attorney, filed with the clerk;
> 3. By oral consent, in open court, entered in the minutes."

We heartily agree with Judge Speer's decision that the policy appears valid on its face, but it seems shocking to put the construction upon it that appellee's counsel does. If the validity of coverages of this accident under the policy was then adjudicated, it seems that the instant suit must be dismissed. The exact words of Judge Speer's "Order" are:

> "That the Order of Suspension issued by Glen M. Schultz, Supervisor of the Montana Highway Patrol . . . be, and the same is hereby set aside." (Record 24, 25).

Preliminary recitals in Judge Speer's "Order" are (R. 24) that he examined appellant's policy "which policy appears valid on its face and became effective at 12:01 A.M. September 20, 1952 . . . that the appellant at the time of the accident referred to in the Order of Suspension, to-wit: September 20, 1952, had in

effect an automobile liability policy, valid on its face." Even if these recitals by Judge Speer before the order or judgment reversing the Supervisor's Order of Suspension be dignified as Findings of Fact, they adjudicate nothing. Sec. 93-5305, R.C., entitled, "Facts found and conclusions of Law must be separately stated—judgment on," provides:

> "In giving the decision or making its findings, the facts found and the conclusions of law must be separately stated, and judgment must thereupon be entered accordingly."

A finding of fact by the trial court cannot be considered an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is a finding of the court.

Galiger vs. McNulty, (Mont.)
260 Pac. 401;

State ex rel Monteath vs. Dist. Court, (Mont.)
37 Pac. 2d 567;

Lewis vs. Lewis (Mont.)
94 Pac. 2d 211;

Stethem vs. Skinner (Ida.)
82 Pac. 451;

Mitchell vs. Insley (Kan.)
7 Pac. 201

The matter is enacted into statute Sec. 93-1001-23 R.C. provides:

> "What deemed adjudged in a judgyent. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In Galiger vs. McNulty, 260 Pac. at p. 403, the Montana Supreme Court laid down the rule in Montana from time immemorial as follows:

> " 'A judgment does not reside in its recitals but in the mandatory portion of it.' 33 C. J. 1194. 'The decisions or findings of a court, referee, or committee do not constitute a judgment, but merely form the basis upon which the judgments are subsequently to be rendered. A verdict is not a judgment, which may or may not be rendered upon it. The findings are not a judgment any more than is a verdict of a jury. Such findings or decisions amount only to an order for judgment.' 33 C. J. 1052. 'A finding of fact of the trial court cannot be considered an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is a finding of the court.' Mitchell v. Insley, 33 Kan. 654, 7 P. 201; Stethem v. Skinner, 11 Idaho, 374, 82 P. 451."

Respectfully submitted,
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Service of the foregoing brief and receipt of three copies thereof is hereby admitted this 7th day of April, 1958.

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